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No. 01-5

IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC; LOCAL 12L, UNITED STEELWORKERS OF AMERICA; and MADE IN THE USA FOUNDATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the Constitution's Treaty Clause, the Framers imposed a Senatorial supermajority check on the consummation of major Presidentally-negotiated international agreements, including—indeed, including most particularly—international commercial agreements of large substance like the North American Free Trade Agreement ("NAFTA" or the "Agreement"). *See* Petition for a Writ of Certiorari ("Pet.") at 8-11, 25-27.

In its Brief in Opposition ("Opp."), as in the lower courts, the United States seeks to drain the Treaty Clause's Senatorial supermajority requirement of all force and effect, arguing that the political branches are free to heed or to ignore that requirement at their discretion.

As we show in this Reply, nothing in the "political question" doctrine (Part I) or in the relevant constitutional provisions (Part II) commends, much less commands, that emasculation of the judicial power to declare the constitutional law, or of the Treaty Clause.

I. THE TREATY CLAUSE QUESTION PRESENTED HERE IS NOT A POLITICAL QUESTION BUT RATHER A PURE QUESTION OF CONSTITUTIONAL LAW TO BE DECIDED BY THE COURTS

A. The Government argues first and foremost that the Eleventh Circuit was correct in treating the constitutional question presented in this litigation—whether, in the face of the Treaty Clause's Senatorial supermajority requirement, international commercial agreements like NAFTA may be accomplished by a bicameral simple majority vote—as a "political" question because there is a "textually demonstrable constitutional commitment of the issue to a

coordinate political department." *Opp. 7, quoting Baker v. Carr*, 369 U.S. 186, 217 (1962). The Government's claim in this regard is not even colorable.

As a matter of language, logic and history, it is vacuous to assert that by designating the President as *Commander-in-Chief of the armed forces*, the Constitution somehow has granted the President the authority to determine whether it is constitutionally necessary to obtain *two thirds Senate approval of a complex, far-reaching commercial agreement like NAFTA*. *See* Opp. 7. The same is true of the Government's reliance on the Constitution's statement that the President is to receive ambassadors. *Id.* And if, as the Government would have it, *id.*, the President's responsibility to "take care that the Laws be faithfully executed" operates to make the question here a political one, then *every* question involving the constitutional requisites for lawmaking must be "political."

The Government's contention, Opp. 7-10, that the Foreign Commerce Clause invests the political branches with the plenary authority to treat the Congressional approval of a Presidentially-negotiated international commercial agreement as a legislative act authorized by that Clause, and as enabling the political branches thus to dispense with the Treaty Clause's two thirds Senatorial supermajority requirement, is every bit as wanting.

The Congressional action approving NAFTA—and NAFTA's voluminous complement of self-effectuating provisions all of which were negotiated by the President and not by Congress—is embodied in a provision stating that

> "[T]he Congress approves . . . the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico." [19 U.S.C. § 3311(a).]

Subject only to confirmation of Mexico's and Canada's implementation of the Agreement, that one-sentence

legislative "approv[al]" was deemed by the United States to constitute authorization for the President to notify Canada and Mexico of NAFTA's "entry into force." *Id.* § 3311(b).[1]

The Framers recognized a clear distinction between negotiating and approving *international commercial agreements*, on the one hand, and enacting foreign commerce *legislation*, on the other. Pet. 25-27. Indeed, the Framers explicitly considered and rejected the suggestion that the power to enact Foreign Commerce Clause legislation should be understood to include the power to adopt international commercial treaties. *Id.* What Congress did here with regard to making NAFTA binding on the United States was to approve its provisions, *not* to legislate their terms. The granting of approval to consummate a Presidentially negotiated international trade agreement is precisely the office the Framers assigned to the Senatorial supermajority process of the Treaty Clause, *not* to the bicameral simple-majority legislative process of the Foreign Commerce Clause.

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[1] As to *some* of NAFTA's provisions, Congress was informed by the President that it was necessary to make certain "statutory changes required or appropriate to implement the Agreement." H.R. Doc. No. 103-159, *Message from the President Transmitting NAFTA, Implementing Bill and Statement of Administrative Action*, at 450 (1993). Congress thereupon enacted such implementing provisions, all of which refer at least implicitly to the Agreement, and some of which (*e.g.*, the provisions authorizing tariff reductions) explicitly incorporate provisions of the Agreement by reference. *See* Pet. 7. Thus, even as to "the subjects addressed by the Implementation Act," Opp. 8, that Act is hardly "independent[ ]" of the Agreement, Opp. 9. And, however the Implementation Act might be characterized with respect to the subjects it "address[es]," the fact remains that most of NAFTA's requirements are *not addressed at all* by the Implementation Act. This is true of *all* of the provisions of NAFTA that require actions by Mexico or Canada, as well as of many of the provisions (for example, those restricting domestic regulation of health, safety and other matters) that require actions by the United States. *See* Pet. 7.

Even where the Constitution grants Congress "plenary authority . . . over [a subject]," *INS v. Chadha*, 462 U.S. 919, 940-941 (1983), it remains for the *courts* to determine "whether Congress has chosen a constitutionally permissible means of implementing that power," *id.* *See also Buckley v. Valeo*, 424 U.S. 1, 132 (1976). Because Congress's Foreign Commerce Clause powers are "*legislative* powers," U.S. Const. art. I, § 1, in exercising that authority Congress must confine itself "to mak[ing] . . . *laws*," *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 187 (1824) (quoting U.S. Const art. I, § 8, cl. 18) (emphasis added). And the Framers were at pains to make clear that Congress's lawmaking power under the Foreign Commerce Clause does not include a power to approve an international commercial agreement and by that means to make the agreement part of the law of the land. *See* Pet. 25-27. *Cf. Gibbons v. Ogden*, 22 U.S. at 228 (Johnson, J., concurring) (noting that the Court's expansive description of the commerce power in *Gibbons* did not speak to matters embraced by "the treaty making power," but only to "laws properly so called").

In sum, neither the Commander-in-Chief power, the Foreign Commerce Clause, nor anything else in the Constitution "textually . . . commit[s]" to the political branches the discretion to dispense with the Treaty Clause's supermajority requirement in adopting NAFTA.

B. The Government's remaining "political question" arguments are weaker yet. As the Government effectively concedes, *see* Opp. 11, the standards for deciding the question raised by this case are no less "judicially discoverable and manageable," *Baker v. Carr*, 369 U.S. at 217, than in numerous other cases where this Court has been called upon to construe unclear provisions of the Constitution, *see* Pet. 22-23. Whatever may be the difficulties in defining the outer boundaries of the undertakings that must be ratified as "treaties," NAFTA plainly is the kind of international

agreement that the Framers determined may only be made with the approval of two thirds of the Senate. *See* Pet. 27-28.

Once it is recognized, as it must be in light of what we have said to this point, that this matter lies squarely within "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it is bootless to protest that the courts would "express [a] lack of the respect due coordinate branches of government," *Baker*, 369 U.S. at 217, if they were to decide the constitutional question presented here. "Such a determination falls within the traditional role accorded courts to interpret the law. . . . Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell v. McCormack*, 395 U.S. 486, 548-549 (1969). *See also United States v. Munoz-Flores*, 495 U.S. 385, 390-391 (1990).

Nor would a judicial decision on the Treaty Clause question produce "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. In the first place, the political branches made no "pronouncement" on the constitutional question raised here; they simply ignored it. And in any event, "since the constitutionality of [a governmental action] is for this Court to decide, there is no possibility of 'multifarious pronouncements' on this question." *Chadha*, 462 U.S. at 942.[2]

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[2] Although we would be the last to deny the importance of this case both to the status of NAFTA and to the adoption of future agreements, a decision in petitioners' favor would *not* "potentially undermine every other major international commercial agreement made over the past half-century." Opp. 12 (quoting App. 33a). As far as we are aware or the Government has indicated, no other "major international commercial agreement"—including the other "fast track" agreements, *see* Opp. 2-3—

We recognize that the Government seeks the benefit of confusion by advancing a series of alternative "justiciability" arguments, each of which was rejected by both of the courts below. Given those rejections, we believe it sufficient to briefly explain in the margin that the lower courts were eminently correct in holding that none of those arguments could justify a refusal to entertain petitioners' constitutional challenge.[3]

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failed to gain the approval of two thirds of the Senate. *See* App. 113a & n. 162.

[3] a. The Government has acknowledged, as it must, that some American workers have experienced and are continuing to experience a loss of employment "as a result of the NAFTA." App. 11a-12a, n.14. Petitioners are among those so injured; the Government has not disputed the Complaint's averment that more than 7,000 workers represented by petitioner United Steelworkers of America "have been certified by the United States Department of Labor as having lost employment due to NAFTA." Dist. Ct. Doc. 17 ¶ 33.

Furthermore, the Government has acknowledged that, "[w]ithout NAFTA, it will be [pre-NAFTA] business as usual," App. 78a, because Mexico will adhere to its pre-NAFTA practices under which American businesses could not readily move operations to Mexico, *id.* This means that, "without NAFTA," jobs held by petitioners' members are likely to remain in, or to return to, this country.

These facts, and others discussed by the courts below, App. 10a-19a, 54a-89a, make it "likely, as opposed to merely speculative," *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181 (2000), that petitioners have been injured in a manner that would be redressed by a decision striking NAFTA down. Petitioners therefore have standing.

b. The justiciability of this case does not depend on answering the difficult question whether an injunction would lie against the President. *See* Opp. 14. Under *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the availability of declaratory relief as well as injunctive relief against *other* officers is sufficient to make the matter justiciable. App. 14a-19a. *See also Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996).

c. The absence of an "express statutory cause of action," Opp. 16, is not a bar. Even the actions of the *President*, not to mention those of other

II. THE DECISION BELOW RENDERS THE TREATY CLAUSE A DEAD LETTER

The Government boldly declares that "the district court was correct in its ruling" that NAFTA constitutionally could be adopted "through the passage of a law, rather than under the Treaty Clause." Opp. 16. But the Government cites nothing in the original materials to counter our comprehensive account of the Framers' intent, embodied in the Treaty Clause, to place a Senatorial supermajority check on the making of international commercial agreements. *See* Pet. 8-11, 25-27. The Government instead relies on the proposition that, "[f]rom its earliest days, Congress has used bicameral legislation to approve rules governing trade with foreign nations." Opp. 17-18. That proposition says far less than it appears to—and far too little to help the Government here.

It is true that there always has been legislation establishing various trade "*rules;*" but none of the legislative actions taken in the nation's "earliest days" involved the making of any international trade *agreement*. On the contrary, for at least 150 years after the adoption of the Constitution, international trade agreements were made only through scrupulous adherence to the Treaty Clause. *See* Pet. 11. The legislative actions to which the Government points were *unilateral United States actions* imposing and suspending unilateral United States embargoes. *See* Opp. 17-18. Such unilateral actions are simply outside the purview of the Treaty Clause, "[the] objects [of which] are CONTRACTS with foreign nations." The Federalist No. 75 (Clinton Rossiter, ed., 1961), at 450-451 (Hamilton). *See* Pet. 27 n.15.

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officers, "may . . . be reviewed for constitutionality," *Franklin*, 505 U.S. at 801, absent any explicit statutory cause of action. *See also Dalton v. Spector*, 511 U.S. 462, 473-474 (1994); *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682 (1949); *Dugan v. Rank*, 372 U.S. 609 (1963).

Even the Government's less ambitious claim—that the pedigree for adopting international trade agreements through legislation spans "more than a century," Op. 18—cannot bear inspection. In particular, contrary to the Government's representation, the McKinley Tariff Act of 1890 did *not* purport to authorize the President to reduce tariffs through mutual and binding *agreements* with foreign countries, but rather to reduce United States tariffs by Presidential *proclamation*. *See Field v. Clark*, 143 U.S. 649, 680 (1892). Thus, *Field v. Clark* cannot be taken as having approved the adoption of tariff agreements without treaty ratification, "for the simple reason that the case . . . did not involve any such agreement." Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 831 (1995).[4] What is more, when the Secretary of State proceeded to take the McKinley Tariff Act as authority to enter into agreements with foreign countries regarding mutual tariff reductions, *the United States informed the countries that had signed such agreements that the agreements were not binding*

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[4] The discussion to which the Government points in *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 322-326 n.2 (1936), *see* Opp. 18, likewise dealt only with action taken by unilateral proclamation, not with the making of international commercial *agreements*.

Dames & Moore v. Regan, 453 U.S. 654 (1981), cited at Opp. 17, involved an Executive Order settling foreign claims. Thus, the decision did not address the respective roles of the Treaty Clause and the Foreign Commerce Clause in the negotiation and adoption of international commercial agreements like NAFTA. The President's unilateral power to enter into foreign claims settlements without Congressional action has been understood to be a separate and distinct power "integrally connected with normalizing United States' relations with a foreign state." *Dames & Moore*, 453 U.S. at 683. *See also United States v. Pink*, 315 U.S. 203, 222-223, 228-230 (1942); *United States v. Belmont*, 301 U.S. 324, 327-331 (1937); Ackerman and Golove, 108 Harv. L. Rev. at 817, 820, 860 & n.272; Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Calif. L. Rev. 671, 736-737, 742 n.356 (1998).

international agreements because they had not been ratified as treaties. *Id.* at 821-824.

On a true historical account, bicameral simple-majority legislation as a substitute for two thirds Senate approval of international commercial agreements must be seen for what it is: a mid-twentieth-century invention of political leaders who viewed the Treaty Clause as a "failure in the original constitutional design," Ackerman and Golove, 108 Harv. L. Rev. at 802, and who wished to "create[ ] a structure for trade negotiations that [they regarded as] superior to the one envisioned by the Framers of the Constitution of 1787," *id.* at 960.

That invention's purpose and effect is to override the Framers' determination that this nation should not make substantial binding international commitments without a greater degree of consensus than is required for domestic legislation. *See* Paul, *supra*, note 4, at 725-726 (quoted at Pet. 17-18). Thus, like other modern efforts to "improve" on the Constitution's lawmaking processes by ignoring constraints imposed by the Framers—*e.g.*, the legislative veto, *see Chadha*, and the line-item veto, *see Clinton v. City of New York*, 524 U.S. 417 (1998)—this "improvement" is unconstitutional.

CONCLUSION

The Petition for Certiorari should be granted.

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